FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of the MISSOURI PACIFIC RAILROAD COMPANY,
Petitioners,
v.
SCOTT COUNTY MILLING COMPANY.
No. 650.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S SUPPLEMENTAL BRIEF.

RALPH E. BAILEY,
JAMES A. FINCH,
R. F. HAYNES,
Counsel for Respondent.

Of Counsel:
ROGER BAILEY,
JAMES A. FINCH, JR.

Petition for Writ of Certiorari filed February [illegible], 1939.
Certiorari granted March [illegible], 1939.

St. Louis Law Printing Co., [illegible] Phone, [illegible]

INDEX.

Subject Index.

	Page
1. Jurisdiction	1
2. Payment of amount sued for was voluntary	12
3. The purpose of the Interstate Commerce Act does not make necessary recovery by petitioners	15
4. Conclusion	16

Cases Cited.

Atlantic Coast Line Railroad v. Florida, 295 U. S. 301, 79 L. Ed. 1451 7

Garr, Scott and Company v. Shannon, 223 U. S. 468, 56 L. Ed. 510 ..... 9, 14

Hale v. Lewis, 181 U. S. 473, 45 L. Ed. 959 9

Leathe v. Thomas, 207 U. S. 93, 52 L. Ed. 118 7

Lewis-Simas-Jones Company v. Southern Pacific, 283 U. S. 654 5

Meeker v. Lehigh Valley Railroad Company, 236 U. S. 412 5

Murdock v. The Mayor of Memphis, 20 Wall. 590, 22 L. Ed. 429 8

Union Pacific v. Board of County Commissioners, 98 U. S. 541, 25 L. Ed. 196 13

Union Pacific Railroad Company v. Public Service Commission, 248 U. S. 67, 63 L. Ed. 131 ..... 2, 12

Statutes Cited.

Interstate Commerce Act, Section 16 (U. S. Code, Title 49, Section 16) 5, 6, 17
Section 862, Revised Statutes of Missouri 1929..... 4

Appendix.

Interstate Commerce Act, Section 16 (U. S. Code, Title 49, Section 16) 19
Section 861, Revised Statutes of Missouri 1929..... 19
Section 862, Revised Statutes of Missouri 1929..... 19

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of the MISSOURI PACIFIC RAILROAD COMPANY, Petitioners,

v.

SCOTT COUNTY MILLING COMPANY.

No. 650.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S SUPPLEMENTAL BRIEF.

JURISDICTION.

In respondent's original brief filed in opposition to the application for writ of certiorari the question of the jurisdiction of this Court was discussed on pages 5, 6, 7, 8 and 9, and the position taken by respondent is that this Court is without jurisdiction for the reason that the judgment of the state court was based, in part, on nonfederal questions broad enough to maintain the judgment.

In petitioners' supplemental brief petitioners seem to rely on the case of Union Pacific Railroad Company v. Public Service Commission of Missouri, 248 U. S. 67, 63 L. Ed. 131, to refute respondent's contention. In the Union Pacific case the Supreme Court of Missouri held that, notwithstanding the charge made by the Public Service Commission of Missouri for certificate authorizing the issuance of bonds secured by a mortgage on the whole line of the Union Pacific Railroad was unreasonable, that the railroad company was estopped to decline to pay the statutory compensation because it had voluntarily made an application to the Commission for such certificate, and from that it was argued that the decision on the ground of estoppel excluded the jurisdiction of this Court; but this Court held that it was the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence where the facts are in dispute, for finding that a federal right had been waived. This Court held that the charge of the Missouri Commission of $10,962.25 for certificate authorizing the issuance of bonds where all but six-tenths of a mile of its main track were outside of Missouri was an unlawful interference with commerce among the states. The railroad company accepted the grant as required by its terms, but protested in writing against the charge as an unconstitutional interference with interstate commerce and gave notice that it paid under duress to escape the statutory penalties and to prevent the revocation of the certificate.

The facts in the Union Pacific case make it easily distinguishable from the facts in the case now before this Court. The statutes of Missouri prohibited the issuance of bonds by the railroad company without authority of the Commission, imposed severe penalties for such issue and purported to invalidate the bonds if issued without such certificate. Under such circumstances the railroad company paid the prescribed fee, but protested in writing

at the time that they were making the payment under duress and to escape the statutory penalties and to prevent the revocation of the certificate. In the instant case the payments made by the petitioners to the respondent were made betwen April 4 and April 19, 1929 (R. 26), while the order of the Commission fixed the time for payment on or before April 26, 1929 (R. 25), and were made before petitioners had filed their first motion for rehearing before the Interstate Commerce Commission, the first motion for rehearing having been filed April 25, 1929 (R. 103). At the time the petitioners made the payments in question the Interstate Commerce Commission had made its finding that respondent was entitled to damages by way of reparation, but no suit had been brought and the Interstate Commerce Commission had no power to enforce its award, and no penalty could be inflicted by the Commission for failure to make payment of damages, and the only recourse the respondent had was to bring suit for damages within one year, and in such suit, if brought in the federal court, the finding of the Commission would be receivable as prima facie evidence.

When the petitioners paid the award it was not paid under protest; it was paid before it was due under the order of the Commission and was ordered to be paid by the vice-president of the railroad company, not because of coercion but because the Frisco Railroad Company had already ordered reparation paid (R. 88).

The Supreme Court of Missouri, in its opinion, held that under the facts in the instant case it would be "against equity and good conscience and a rank injustice" to require the respondent to repay the amount of the award to the carrier. Granting that it is the province and duty of this Court to examine the facts to determine whether or not there is any basis for the decision of the state court, it is respondent's view that the facts in the record amply

support the findings of the lower court on this question. The agreed statement of facts and the depositions offered at the trial of the case in the state court show that the respondent was under contract to pay its representative 50 per cent of the amount of the award, and that when the payments were made to it prior to the final date for payment as fixed by the order of the Commission and before the filing of a motion for rehearing the respondent paid its representative 50 per cent of the amount it received, and that although the final order of the Interstate Commerce Commission attempting to set aside all of its previous orders was entered on July 3, 1933 (R. 31), no demand was made upon respondent for return of the money until the 30th day of October, 1934 (R. 27). If the petitioners had demanded the return of the money at the time of the final order of the Commission July 3, 1933, the respondent's claim against its representative for return of the fee paid for his services would not have been barred by the Missouri Five-Year Statute of Limitations (Sec. 862, Revised Statutes of Missouri 1929, Appendix, p. 19), but the petitioners made no demand until November, 1934, which was more than five years after the respondent had paid its representative, and therefore its claim for reimbursement was barred by the Missouri Five-Year Statute of Limitations. The record in the case likewise discloses that there was no reason for the respondent to assume that the petitioners would seek to recover the amount paid it, because in one of the numerous petitions filed for rehearing before the Interstate Commerce Commission, to wit, the petition filed July 10, 1931 (R. 27), the petitioners alleged:

> "The Scott County Milling case, supra, involves future rates and reparation. The reparation has been paid, the rates prescribed made effective and the case is asked to be reopened for the purpose of having the Commission prescribe for the future a different and higher basis of rates."

It is conceded by respondent that the construction of Section 16, Chapter I, of the Interstate Commerce Act, found in Title 49, United States Code Annotated, is a federal question, and it is further conceded that if the state court construed this section in any manner that conflicts with the views of this Court as to the proper construction, the state court's construction cannot stand; but we have been unable to find anything in the decision of the Missouri Supreme Court that conflicts with what this Court has said as to the construction of said section.

In respondent's original brief reference was made to the case of Meeker v. Lehigh Valley Railroad Company, 236 U. S. 412, as to the construction of said Section 16 of the Commerce Act.

Another decision by this Court construing the same section is Lewis-Simas-Jones Company v. Southern Pacific, 283 U. S. 654, wherein the Court said:

> "This act does not create a cause of action based on the Commission's findings and reparation order for the recovery of money collected as freight charges based on rates alleged to be unjust and unreasonable. It makes a determination by the Commission of the unreasonableness of the rate attacked and the extent that it is, if at all, excessive a condition precedent to suit.
>
> "Section 16 (2) provides that, if the carrier shall not comply with an order for the payment of money within the time specified, the person for whose benefit it was made may file in the District Court of the United States 'or in any state court of general jurisdiction' a petition setting forth briefly 'the causes for which he claims damages and the order of the Commission,' and that the suit in the United States court shall proceed in all respects 'like other civil suits for damages,' except that the findings and order of the Commission shall be prima facie evidence of the facts therein

stated. The section contains nothing relating to evidence or procedure in state courts. It is clear that the action is not on the award as such."

The state court, in construing the said section 16, said (R. 107):

"The reparation award made by the Commission is not a judgment and the Commission could not have enforced its payment. The Interstate Commerce Act provides that if a carrier does not pay the award within the time fixed in the Commission's order, the shipper may bring a suit against the carrier in a court of competent jurisdiction to recover damages because of the unreasonable charges exacted, and in such suit the order of the Commission shall be prima facie evidence of the facts stated in such order.

"The carrier could have refused to pay the award made by the Commission and awaited a suit by the shipper, in which suit it could have invoked every defense which the law afforded it. It did not take that course, but on the contrary paid the award in full before filing its motion for rehearing with the Commission."

It is respectfully submitted that the construction of said section 16 by the state court is in harmony with the construction given that section by this Court.

The state court held that under the facts in this case the payment was a voluntary payment, and such decision is in harmony with the rule in Missouri with respect to voluntary payment, the authorities on this question being cited in respondent's original brief, pages 6 and 7.

It is respondent's view that the question as to whether or not the payments made by the carrier to the respondent were voluntary or involuntary does not in anywise depend upon the construction of said Section 16 of the Commerce Act; rather, the question as to whether they were volun-

tary or involuntary depends upon the facts regarding the payments and the circumstances under which the payments were made, and whether under such existing facts and circumstances such payments were voluntary or involuntary are matters of general law to be determined by the law of the forum and are not in any sense federal questions.

The state court decision rested not alone on the question of the payments being voluntary, but the decision rested on the further question as to whether or not under the circumstances as shown by the record in this case it would be inequitable to require the respondent to repay the money it had received. It is again submitted that whether or not equity and good conscience would require the restoration of the money is a matter of general law, and not in any sense a federal question nor dependent at all upon the construction of any section of the Commerce Act; rather, it depends upon the relation of the parties, the circumstances as shown by the record and whether or not the equities require the restoration of the fund.

The holding of the state court that in an action for money had and received the plaintiff cannot recover if it appears from the facts that it would be inequitable and unjust to compel the defendant to return the money is in harmony with the decision of this Court in the case of Atlantic Coastline Railroad Company v. Florida, 295 U. S. 301, 79 L. Ed. 1451. It appears to be a rule of decision in this court, however, that if the record discloses that there were completely adequate grounds for the state court's decision on a nonfederal question, this Court will not inquire as to whether the decision upon such question was correct or incorrect. In Leathe v. Thomas, 207 U. S. 93, 52 L. Ed. 118, the Court said:

> "It is admitted that the general and well-settled rule is that in a case coming from a state court this

court can consider only federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions. Murdock v. Memphis, 20 Wall. 590, 22 L. Ed. 429; Sauer v. New York, 206 U. S. 536, 546, 51 L. Ed. 1176, 1181, 27 Sup. Ct. Rep. 686. It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be. Murdock v. Memphis, supra. But Murdock v. Memphis does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this court commonly does not inquire whether the decision upon them was or was not correct, or reach a federal question by determining that they ought not to have been held to warrant the result. 20 Wall. 590, 635, 22 L. ed. 429, 444; Eustis v. Bolles, 150 U. S. 361, 369, 37 L. ed. 1111, 1113, 14 Sup. Ct. Rep. 131; Castillo v. McConnico, 168 U. S. 674, 679, 42 L. ed. 622, 624, 18 Sup. Ct. Rep. 229."

In the early case of Murdock v. The Mayor and Aldermen of Memphis, 20 Wall. 590, 22 L. Ed. 429, the Court said:

"1. That it is essential to the jurisdiction of this Court over the judgment of a State Court that it shall appear that one of the questions mentioned in the Act must have been raised, and presented to the State Court.

"2. That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree, rendered in the case.

"3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States.

"4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State Court.

"5. If it finds that it was rightly decided, the judgment must be affirmed.

"6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."

In Hale v. Lewis, 181 U. S. 473, 45 L. Ed. 959, the Court held that a decision of the state court that a corporation was estopped to set up the invalidity of a statute, even if it was unconstitutional, could not be reviewed by the Supreme Court of the United States, since the estoppel was a nonfederal ground broad enough to support the judgment.

In Garr, Scott and Company v. Shannon, 223 U. S. 468, 56 L. Ed. 510, this Court held that where the question as to a voluntary payment fairly arose out of the record and was not arbitrarily injected into the case, this Court was without jurisdiction. In this opinion the Court said:

"What we have said shows that the question as to voluntary payment fairly arose out of the record and was not arbitrarily injected into the case. Leathe v. Thomas, 207 U. S. 99, 52 L. Ed. 120, 28 Sup. Ct. 130. A decision on that nonfederal point could properly dispose of the plaintiff's suit to recover back what it had paid."

We believe that the record in this case shows com-

pletely that the questions of voluntary payment and estoppel fairly arose out of the record and were not arbitrarily injected into the case. In respondent's answer in the state trial court defendant alleged (R. 13) that the Interstate Commerce Commission had no power or authority to issue execution or process for the purpose of enforcing its order, and that the railroad company could either voluntarily acquiesce in the order or refuse to make payment, and that, if they refused to make payment, the only recourse was a suit for damages, and alleged that after the order the railroad company, with knowledge of the facts and without fraud or duress, voluntarily elected to pay the reparation, and that the same could not be recovered back.

The answer further alleged (R. 14) that the respondent had employed a traffic expert to represent it before the Commission and agreed to pay him a contingent fee of 50 per cent, and that when the railroad company paid the reparation respondent believed the matter had been concluded and finally terminated and paid its representative 50 per cent of the amount received, and that no demand for repayment was made for more than five years, so that respondent's right to recover against its traffic expert was barred by the Missouri Statute of Limitations, and that respondent had distributed the balance of the fund by way of dividends to its stockholders and used it for corporate purposes, and that the railroad company and its trustees had stood by for six years without making a claim or demand, and that when it filed one of its motions for rehearing it alleged that the reparation had been paid and that the railroad company was asking the case to be reopened for the purpose of having the Commission prescribe for the future a different and higher basis of rate.

The answer further alleged (R. 15) that after the Interstate Commerce Commission had set aside its order reduc-

ing the rates on coal from Southern Illinois to Southeast Missouri points from $2.13 a ton to $1.63 a ton the railroad company and connecting lines voluntarily filed a rate of $1.75, thereby admitting and confessing that the previous rate of $2.13 a ton was unreasonable, and alleging that the Missouri Pacific Railroad Company and its trustees had been reimbursed by connecting carriers for a large portion of the money they seek to recover in this action, and that the railroad company never at any time filed before the Interstate Commerce Commission any petition making any claim or contention that the respondent should return the reparation paid.

The answer further alleged (R. 16) that if the railroad company had not elected to pay a reparation the respondent would have had a cause of action for damages if instituted within one year, and that the payment of the reparation by the railroad company prevented the respondent from instituting such action and prevented the respondent from having its rights litigated in the courts, and that the railroad company was now estopped from claiming the reparation was wrongfully paid.

The answer further alleged (R. 17) that under the rules of the Commission a petition for rehearing should be filed within sixty days and that under the rules of the Commission a second application for rehearing, reargument, reconsideration or vacation of any order, by the same party or parties, and upon the same ground, which has been considered and denied, would not be entertained, and that the petition for reopening and reargument which was filed June 3, 1931, was not filed within sixty days after the service of the report of order for the reparation and was filed by the same parties and on the same grounds as former petitions had been filed, which had been overruled, and that by virtue of the rules adopted by the Commission it had no power or authority to entertain such petition for rehearing and that the order of the Commission

had become final long prior to the filing of petition for rehearing on June 3, 1931, and that under the rules of the Commission it was without power or authority to enter an order with retroactive effect so as to affect the private rights of the respondent.

The agreed statement of facts (R. 22-31) and the depositions offered (R. 87-91) support the allegations of the answer in so far as questions of fact were raised by the answer.

In this situation it is the view of the respondent that the question of voluntary payment and the question of estoppel arose out of the record, and, in fact, was in the case from its inception in the state trial court, and that such questions were not arbitrarily injected into the case by the Supreme Court of Missouri for the purpose of trying to avoid the jurisdiction of this Court, but were live, vital questions, raised at the inception of the case in the state court, and were issues properly raised and properly in the record to be considered and determined by the Missouri Supreme Court.

PAYMENT OF THE AMOUNT SUED FOR WAS VOLUNTARY.

In petitioners' supplemental brief reference is again made, on the question of whether or not the payments were voluntary, to the case of Union Pacific Railroad Company v. Public Service Commission of Missouri, 248 U. S. 67. The quotation from the opinion set out on page 4 of petitioners' supplemental brief distinguishes that case from the instant case. The opinion says:

> "The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The Rail-

road Company and its officials were not bound to take the risk of these threats being verified."

The petitioners were not confronted with any such trying situation when they made the payments to respondent. Neither their franchises nor their property was in jeopardy. The only penalty for failure to pay was the possibility of an attorney fee being taxed as costs in the event the shipper prevailed in the suit for damages if such suit was brought within a year, as provided by the Commerce Act.

In many states delinquent taxes are collected by suit, and the trial court is authorized to tax as costs a reasonable attorney fee for the tax attorney. In so far as we have been able to ascertain, it has never been held that the fact that an attorney fee might be taxed as costs would of itself make the payment before suit was brought an involuntary payment or one made under duress.

In Union Pacific Railroad Company v. Board of County Commissioners, 98 U. S. 541, 25 L. Ed. 196, this Court passed upon a case where the Union Pacific Railroad Company brought suit to recover taxes paid on lands in Dodge County, Nebraska, granted by Congress to the company to aid in the construction of the railroad. The lands were placed on the assessment list of the county, and general and local taxes levied for the respective years were carried out against the lands and the railroad company designated as owner. In due time tax warrants were delivered to the treasurer for collection. The warrants authorized the treasurer, in default of payment, to seize and sell the personal property of the persons making default. No demand for the payment of taxes was necessary under the law, and the railroad company had personal property in the county that might have been seized. Without any demand for the payment of the taxes the railroad company

made the payment and delivered to the treasurer a notice in writing that it protested against the taxes paid, for the reason that they were illegal and unauthorized by law, and that suit would be instituted to recover back the money paid. Thereafter, in a decision of this Court, which was supposed to decide that the particular land in question was not subject to taxation, suit was brought to recover the taxes, and this Court said:

> "Under such circumstances we cannot hold that the payment was compulsory in such a sense as to give a right to the present action. As the answer to this question disposes of the case, it is unnecessary to consider the other question certified, and that judgment is affirmed."

It is our view that the decision of the state court that the payment was voluntarily made by the petitioners to the respondent is amply supported by the above-quoted case. In the Union Pacific case the treasurer had the tax warrant in his hands which authorized a levy without first making demand, and when the tax was paid written protest was filed, but in the instant case not only was there complete lack of authority to levy on property or to work a forfeiture in any sense, but, in addition, the payments were made without protest, and the petitioners would have their day in court if the respondent brought suit for damages following the award made by the Commission.

In Garr, Scott and Company v. Shannon, 223 U. S. 468, 56 L. Ed. 510, the Court said:

> "Neither a statute imposing a tax nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be duress of goods, or if there is, the citizen, to avoid the consequence of the duress, may pay the money, regain the use of his property and maintain a

suit for the recovery of what has been exacted from him."

In petitioners' supplemental brief, on page 5, it is urged that the respondent elected to demand and receive the payment from the petitioners before the expiration of the time given petitioners to file a motion for rehearing, with no assurance, express or implied, that a motion for rehearing would not be filed with the Commission. It appears clearly from the testimony (R. 88) that when the vice-president of petitioners advised respondent's representative that they would pay the reparation because the Frisco Railroad had ordered reparation paid, there was no intimation that the matter would be litigated further or that a motion for rehearing would be filed, and it thus appears that the respondent was justified in treating the matter as a closed transaction. If petitioners had intended to litigate the matter further they could have done one of many things to advise the respondent that they intended so to do. They could have waited until after suit was brought; they could have at least paid under protest; they could have at least waited until after they had filed a motion for rehearing; but without doing either, they paid before the due date as fixed by the Commission, without coercion and under circumstances that the state court held the payment to be voluntary.

THE PURPOSE OF THE INTERSTATE COMMERCE ACT DOES NOT MAKE NECESSARY RECOVERY BY PETITIONERS.

The point is made in petitioners' original brief, and again in supplemental brief, page 5, that a holding that petitioners are entitled to recover in this case would be in accord with the purpose of the Interstate Commerce Act,

and cases are cited holding that the purpose of Congress in passing the Interstate Commerce Act was to cut up by the roots every form of discrimination, favoritism and inequality, and the argument is made that to permit this respondent to retain the payment in face of the fact that the carrier could not be required to pay other shippers similarly situated would open the door to discrimination and preference. We think that the fact that one shipper pursued his remedy and another did not does not amount to the discrimination, favoritism and inequality sought to be eradicated by the Interstate Commerce Act. When the Commission orders reparation a shipper is limited to one year in which to bring an action. If one shipper brings suit within a year and another shipper does not, it results in an inequality. If the carrier fails to collect the full charges for shipments and as to one shipper suit is brought within the time prescribed by the statute, the carrier lawfully collects the amount due. If, however, as to another shipper suit is not brought within the statutory period of time, the cause of action is barred and the additional freight charge is never paid. Every shipper who is affected by the order of the Interstate Commerce Commission with respect to the payment of reparation had the same right to bring suit against the carrier for damages in the event payment was not made, as did the respondent, and the fact that some other shipper was not or may not have been paid and, not having been paid, failed to exercise the right given by statute to sue within one year and lost such right, does not amount to a discrimination or favoritism such as the Interstate Commerce Act sought to wipe out.

CONCLUSION.

In conclusion, it is submitted that under the facts shown by the record in this case the payments were made without duress and were voluntary, and that in the state court the

respondent raised the questions of voluntary payment and estoppel and that on both of those questions the Supreme Court of Missouri passed on the issues thus raised, and that they were live, substantial questions in the case, and that such questions were not in any sense federal questions, and in addition it is respectfully submitted that the decision of the state court that the payments were voluntary is not in conflict with the decisions of this Court as to what constitutes duress or voluntary payment, and it is further submitted that in so far as the state court attempted to construe Section 16 of the Commerce Act, their construction is in harmony with the construction of this Court.

Respectfully submitted,

RALPH E. BAILEY,
JAMES A. FINCH,
R. F. BAYNES,
Counsel for Respondent.

Of Counsel:

ROGER BAILEY,
JAMES A. FINCH, JR.

APPENDIX.

Applicable statutes of limitations of Missouri to suits for money had and received are as follows:

"Sec. 861. **What actions shall be commenced within ten years.**—Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for (R. S. 1919, Sec. 1316)."

"Sec. 862. **What within five years.** Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 861, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud (R. S. 1919, Sec. 1317)."

Section 16, Chapter 1, of the Interstate Commerce Act, found in Title 49, U. S. C. A., page 6, is as follows:

"(1) **Orders by commission for payment of dam-**

ages. If, after hearing on a complaint made as provided in section 13 of this chapter, the complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"(2) **Proceedings in courts to enforce orders; costs; attorney's fee.** If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court or general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

"(3) **Limitation of actions.** (a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after

* * * * * * *

"(f) A petition for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the state court within one year from the date of the order, and not after."

SUPREME COURT OF THE UNITED STATES.

No. 650.—October Term, 1938.

L. W. Baldwin and Guy A. Thompson, as Trustees of Missouri Pacific Railroad Company, Petitioners, *vs.* Scott County Milling Company. } On Writ of Certiorari to the Supreme Court of the State of Missouri.

[June 5, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

The decision in this case depends on provisions of the Interstate Commerce Act and orders of the commission.

In September, 1924, respondent and others complained to the commission that the tariff charges they had been and were then paying the Missouri Pacific and other carriers for the transportation of coal from mines in southern Illinois and western Kentucky to destinations in southeastern Missouri and northeastern Arkansas, were excessive. They asked the commission to establish reasonable rates for the future, to ascertain the amount of damages they had sustained, and to order the carriers to make reparation. After hearings the commission, by order of February 11, 1929, and supplemental order of March 11 in the same year, found that the carriers' tariff rates had been, were, and for the future would be, unreasonable to an extent indicated, prescribed as reasonable lower rates to be established for the future, and found that complainants including respondent, having paid excessive charges, had suffered damages and were entitled to reparation to the extent of the difference between amounts paid and what the charges would have been under the rates that the commission then found reasonable.

On demand of the respondent, made in accordance with the commission's rules of practice,[1] the Missouri Pacific before April 20, 1929, paid it $23,994.33, being the amounts directed to be paid by the reparation order on account of shipments for which the Missouri Pacific, delivering carrier, had collected the charges. After denial of a number of petitions for rehearing filed by the Missouri Pacific and other carriers, the commission, November 2, 1931, reopened

[1] The applicable rule is V: Reparation Statements — Formal Claims for Reparation Based Upon Findings of the Commission. See Rules of Practice Before the Commission, revised to April 1, 1936.

the case. July 3, 1933, after hearings and protracted contest, it found the rates that it had theretofore condemned were not unreasonable and set aside all findings and orders that it had made, including the reparation order on which respondent had collected.

October 30, 1934, petitioners, who had been appointed trustees of the Missouri Pacific, asked respondent to refund the amount it had received; respondent refused. To recover with interest the amount the Missouri Pacific paid, petitioners brought this suit in a circuit court of Missouri; it gave judgment for respondent. The supreme court affirmed. It held that, as the Missouri Pacific had paid the amount of the reparation award with full knowledge of the facts without denying liability or waiting to be sued, the payment was a voluntary one and that therefore petitioners were not entitled to recover. The court also held that by the voluntary payment the Missouri Pacific caused respondent to believe that the matter was a closed transaction and that in the circumstances, to which reference will later be made, it would be inequitable to require respondent to refund.

We think that petitioners are entitled to recover.

1. In absence of prior finding by the commission that the tariff charges collected for interstate transportation are unreasonable, there can be no enforceable claim for damages caused by exactions according to the tariff. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 444. *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506, 510. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, 259. And see *Lewis, etc. Co.* v. *Penna. R. R. Co.*, 283 U. S. 654, 661; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, 458. Prior to the findings and orders of the commission, February 11 and March 11, 1929, respondent was not permitted to collect, nor was the Missouri Pacific or other carriers allowed to pay, the damages claimed by respondent. But when the commission made the findings and reparation orders, the carriers, in the absence of facts constituting a defense, were in duty bound to pay in accordance with the order.

Section 16(1)[2] provides that if the commission shall determine complainant entitled to an award of damages, it shall direct the car-

[2] "If, after hearing on a complaint made as provided in section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." 49 U. S. C. § 16(1).

rier to pay complainant the sum to which he is found entitled within a specified time. Section 16(2)[3] declares that if the carrier does not comply within the time limit, complainant may bring suit setting forth the causes for which he claims damages. It also declares that, in claimants' suits in federal courts, the findings and order of the commission shall be prima facie evidence of the facts therein stated. It allows plaintiffs, if they prevail, to recover reasonable attorneys' fees. By thus laying on the carriers the burden of bringing forward evidence to overcome presumptions created against them, and by compelling them, if defeated, to pay plaintiffs' attorneys' fees in addition to the interest allowed by law, the Act unmistakably evidences purpose directly to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the commission's awards. In *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412, this Court, upholding the clause as to attorneys' fees, said (p. 433): "The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce. . . . One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands does not militate against its validity. And in *St. L. & S. F. R. R.* v. *Spiller*, 275 U. S. 156, referring to the same provision, we said (p. 159): "The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order."

There is nothing in the record to indicate, nor is it suggested by respondent or in the state court's opinion, that the Missouri Pacific

[3] "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." 49 U. S. C. § 16(2).

had any defense against respondent's claim under the findings and reparation order. The liability so established persisted until payment of the claim. It may not reasonably be held that the Missouri Pacific was bound to await suit or delay adjudication by false or frivolous answer while expenses of litigation, interest, and fees for its adversary's counsel accumulated. Sections 16(1) and 16(2) indicate legislative purpose to penalize failure of carriers, having no defense, to pay damages in accordance with the terms of the commission's findings and reparation orders.

But by § 16a,[4] the commission was empowered to set aside its orders. That section was drafted by the commission at the request of the Senate Committee on Interstate Commerce and was added by the Hepburn Act of 1906. It was "a new section . . . . which expressly authorizes the commission to review and modify its own decisions."[5] It was expounded by the commission as "intended to give the commission a right to rehear a matter for the purpose of correcting any injustice in a previous order." *Cattle Raisers' Asso. of Texas* v. *M. K. & T. Ry. Co.*, 12 I. C. C. 1, 3. While careful to prevent applications for rehearing from being used to avoid or delay compliance with the commission's orders, it empowers the commission at any time to grant rehearings as to any decision, order, or requirement and to reverse, change, or modify the same. Respondent made its demand and collected the money subject to the authority of the commission to set aside the order which authorized payment of the same.

The clauses of § 16a that authorize the commission to consider facts arising after the former hearing and that make its decisions

---

[4] "After a decision, order, or requirement has been made by the commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order." 49 U. S. C. § 16a.

[5] Nineteenth Annual Report of the Interstate Commerce Commission, p. 12.

after rehearing subject to the same provisions as an original order manifest the purpose of the Act to require carriers to serve for, and the shippers to pay, the lawful tariff rates. The Act condemns every deviation from lawful tariff rates. It declares that no carrier may lawfully collect a greater or less or different compensation for transportation than the rates specified in the tariff filed nor refund or remit any portion of the rates so specified. § 6(7); see also § 10(2). Similarly, it condemns the obtaining of transportation for less than the legally established rate. See § 10(3) and (4). Involuntary rebates as well as those that are voluntary are prohibited. *Lowden, et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, — U. S. —. *Pittsburgh &c. Ry. Co.* v. *Fink*, 250 U. S. 577, 582. *N. Y. Cent. R. R.* v. *York & Whitney Co.*, 256 U. S. 406. By accepting delivery of the coal, respondent became bound to pay the tariff charges. As the commission has found them not unreasonable but lawful, respondent is without right to retain the amount it collected upon the claim that they were excessive.

The retention by respondent of money collected under the findings and order that the commission later set aside and vacated clearly would be repugnant to the policy and provisions of the Act.

2. The facts on which the state court held it would be inequitable to require respondent to refund may be briefly stated. Respondent employed an expert to represent it before the commission and promised to pay him one-half the amount recovered as reparation. Upon collection, it promptly paid as agreed. When petitioners asked refund, more than five years had elapsed and suit to recover back the fee was barred by the statute of limitations. Respondent used the other half to pay dividends and for other corporate purposes. As above indicated, the court held the payment to be voluntary and rested its ruling on that fact. But as shown above it was not voluntary; it was demanded by respondent and compelled by the Act, findings, and reparation order. Moreover, equitable considerations may not serve to justify failure of carrier to collect, or retention by shipper of, any part of lawful tariff charges. *Pittsburgh &c. Ry. Co.* v. *Fink, supra. N. Y. Cent. R. R.* v. *York & Whitney Co., supra.*

Reversed.